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ANSWER AND BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

Supreme Court of the United States

OCTOBER TERM, 1925

No. [redacted] 185

WILL MOORE,
Insurance Commissioner of the State of Oregon,
Appellant,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and NATIONAL SURETY COMPANY.

Appeal from the District Court of the United States for the District of Oregon.
(31,358)

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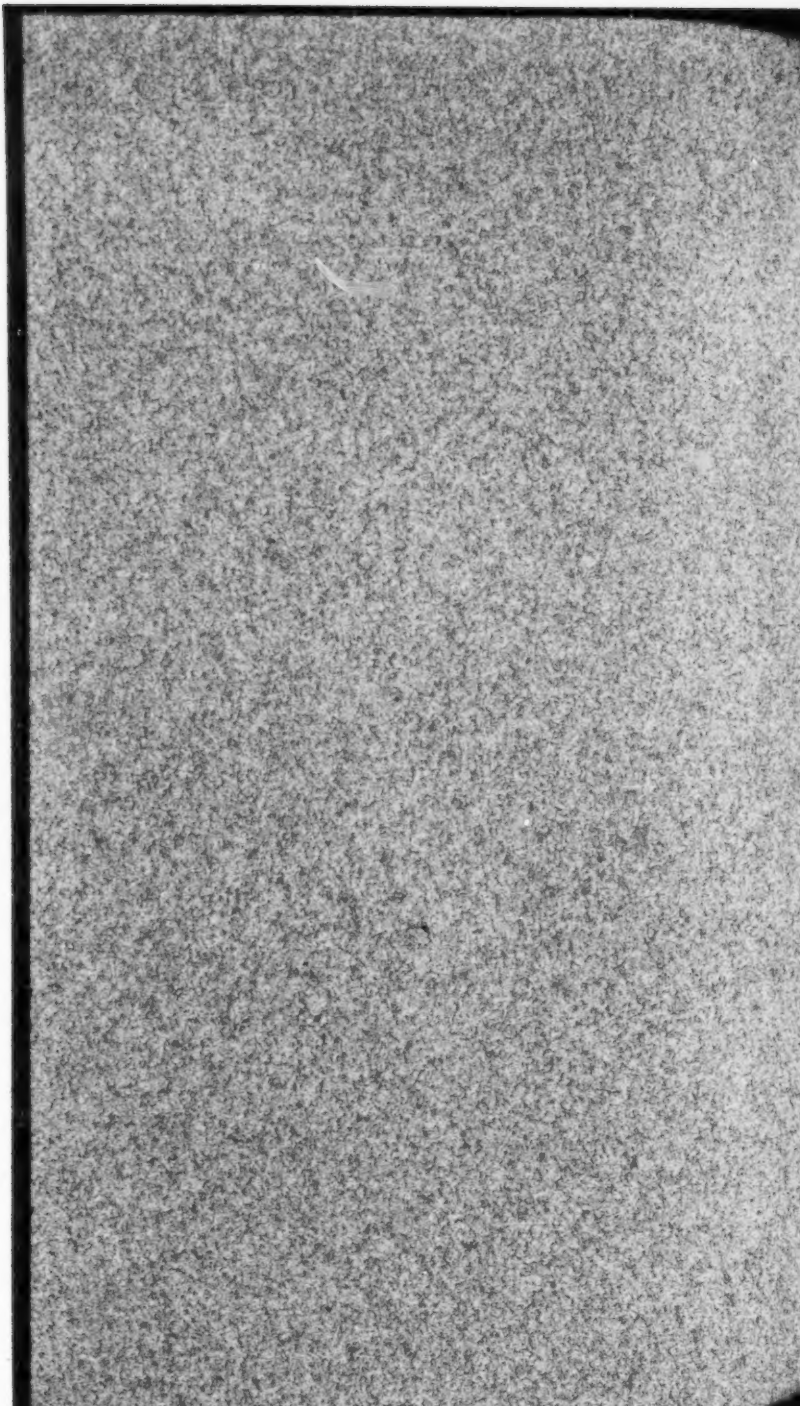

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TEXTBOOKS AND OTHER AUTHORITIES CITED

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No. 635

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Insurance Commissioner of the State of Oregon,
Appellant,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and NATIONAL SURETY COMPANY.

Appeal from the District Court of the United States for the District of Oregon.

(31,358)

(The opinion of the United States District Court for the District of Oregon, is reported in 3 Fed. (2d) 652)

ANSWER AND BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

Comes now appellant, Will Moore, Insurance Commissioner of the State of Oregon, and, answering the order of the court to show cause why the appeal herein should not be dismissed for lack of jurisdiction in this court, alleges and shows as follows:

I

The order of the Insurance Commissioner, enforcement of which this suit was brought to enjoin, is an order made by an administrative board or commission created by and acting under the statute of the State of Oregon.

First: That the Department of Insurance of the State of Oregon is an administrative board or commission created by and acting under the statute of the state of Oregon.

Section 6324, Oregon Laws, as amended by chapter 329, Laws of Oregon, 1921, reads as follows:

> "'There shall be in this state a department charged with the execution of the laws relating to insurance, to be called the 'department of insurance of the state of Oregon.' At the head of such department there shall be a state insurance commissioner. He shall be appointed by the governor * * *."

Second: That at all times since March 1, 1923, the defendant herein, Will Moore, the Insurance Commissioner of the State of Oregon, has been and still is the duly appointed, qualified and acting Insurance Commissioner of the State of Oregon. (Par. Fourth, p. 2, Transcript of Record.)

Third: That the Insurance Commissioner, under the provisions of section 6324, Oregon Laws, as amended by chapter 329, Laws of 1921, is made the head of the Department of Insurance of the State of Oregon, and as such head of the Department of Insurance of the State of Oregon, the Insurance Commissioner is by statute granted power, and is commanded to exercise the power, to enforce all the laws of the state relating to insurance, and it is made the duty of such Insurance Commissioner to enforce all the provisions of such laws for the public good.

It is also provided by statute that the Insurance Commissioner shall issue such department rulings, instructions, and orders as he may deem necessary to secure the enforcement of the provisions of the act relating to the business of insurance in the state of Oregon.

Section 3326, Oregon Laws, reads as follows:

"The Insurance Commissioner shall have and exercise the power to enforce all the laws of the state relating to insurance, and it shall be his duty to enforce all the provisions of such laws for the public good. He shall issue such department rulings, instructions and orders as he may deem necessary to secure the enforcement of the provisions of this act, but nothing contained in this act shall be construed to prevent any company or persons affected by any order or action of the Insurance Commissioner from testing the validity of same in any court of competent jurisdiction."

Section 6328, Oregon Laws, as amended by chapter 155, General Laws of Oregon, 1921, provides:

"1. A foreign or alien insurance company may be authorized or licensed to do business in this state when it shall have complied with the following requirements:

* * * * * * *

"7. Every such insurance company or other insurer, excepting a marine insurance company, before it shall receive a license or a renewal of its license to transact the business of making insurance as an insurer in this state, shall file in the office of the Insurance Commissioner its rating schedules and policy forms to be used in the transaction of its business in this state.

* * *."

Subdivision (2), section 6326, Oregon Laws, relating to the powers and duties of the Insurance Commissioner, provides:

"He shall issue all certificates and licenses under the seal of his office provided for by the terms of this act. Before granting certificates of authority to any insurance company to issue policies or make contracts of insurance in this state, the commissioner shall be satisfied by such examination as he may make, or such evidence as he may require, that such company is duly qualified under the laws of this state to transact business herein."

Fourth: That the acts of said Insurance Commissioner are not reviewable by any officer or administrative board of the state of Oregon, and said Insurance Commissioner is, in fact, the Department of Insurance; therefore, the acts of said Insurance Commissioner are, in fact, the acts of the Department of Insurance of the State of Oregon.

Section 6324, Oregon Laws, as amended by chapter 329, Laws of Oregon, 1921.

Section 6326, Oregon Laws.

(Both above quoted.)

Fifth: That during the year 1921, appellees herein filed with the former Insurance Commissioner copies of a form of what is commonly known and designated as a confiscation bond or confiscation coverage on auto-vehicles sold on conditional sales contracts, which bond undertook to indemnify the vendor against any loss which he might sustain caused by the confiscation by municipal, federal or state authorities, of such auto-vehicles by reason of the violation (other than by the insured, or with the permission of the insured) of the provisions of any municipal, federal or state law. That the then Insurance Commissioner approved said form of bond and issued and delivered to the appellees herein his approval and authorization of such confiscation coverage.

That on or about the 20th day of November, 1923, Will Moore, the duly appointed and acting Insurance Commissioner of the State of Oregon, the appellant herein, delivered to each of the appellees herein the order of the Department of Insurance of the State of Oregon, an administrative board or commission of the state of Oregon, created by and acting under the provisions of chapter 203, General Laws of Oregon, 1917, and acts amendatory thereof, issued by said Insurance Commissioner in accor-

dance with law, which order is designated and known as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," which was substantially set out in paragraph ninth of plaintiffs' complaint herein (page 7, Transcript of Record), and which reads in full as follows:

"Department Bulletin No. 25

"Will Moore,
Insurance Commissioner.
(Seal)
Department of Insurance
Salem

"Department Bulletin No. 14, dated April 21, 1921, regarding the use of Confiscation Clause in Oregon, and Department Bulletin No. 17, dated May 25, 1921, regarding Confiscation Coverage, are hereby canceled and approval of confiscation clause heretofore permitted by these bulletins is withdrawn.

"This bulletin is issued in accordance with opinion by the attorney-general of Oregon, regarding the use of confiscation clause in this state. The opinion reads in part as follows:

" '13 Corpus Juris, page 445, Sec. 382—Agreements calculated to impede the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or employed in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.'

* * * * * * *

" 'In my opinion, therefore, such business falls within the definition above quoted, and is void as against public policy and can not be authorized by the Insurance Commissioner.'

"(Signed) Will Moore,
Insurance Commissioner.

"November 20, 1923."

Enforcement of this order was enjoined by the district court upon the final hearing of the present suit, and the defendant, Insurance Commissioner, appealed to this court.

Sixth: The appellant herein, the Insurance Commissioner of the State of Oregon, was acting under the authority granted him by a state statute in issuing the order forbidding an act against public policy, which public policy had been declared by the constitution and statutes of the United States and by the constitution and statutes of the state of Oregon. Such order was issued in the discharge of the duty imposed upon him by section 6326, Oregon Laws, hereinbefore quoted, "to enforce all the provisions of such (insurance) laws for the public good." He had a right to be guided, as to what is for the public good, by the constitution and laws of the United States and the state of Oregon. In fact, he could have no better authority.

The eighteenth amendment to the Constitution of the United States, which operates throughout the entire territorial limits of the United States, and binds all individuals, public officers, courts and legislative bodies within those limits, provides:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.
>
> * * * * * * *"

The National Prohibition Act (41 Stat. 305), popularly known as "The Volstead Act," and acts amendatory thereof, is an act to prohibit intoxicating beverages. Section 26 (p. 315) of said act reads as follows:

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors, in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the treasury of the

United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. * * *"

An amendment to the Constitution of the State of Oregon was proposed by initiative petition filed July 1, 1914, and was adopted by the vote of the people on November 3, 1914, which reads as follows:

(§ 36, Art. I, Constitution of Oregon, p. 94, Oregon Laws.)

"From and after January 1, 1916, no intoxicating liquors shall be manufactured, or sold within this state, except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

"This section is self-executing, and all provisions of the constitution and laws of this state and of the charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section, are hereby repealed."

The Legislative Assembly of the State of Oregon in 1915 enacted chapter 141, General Laws of Oregon, 1915, relating to intoxicating liquors, and prohibiting the manufacture and sale thereof within the state of Oregon. (Sections 2224 to 2224-67, both inclusive, Oregon Laws), which is still in effect.

The Legislative Assembly of the State of Oregon in 1923 enacted chapter 29, General Laws of Oregon, 1923, entitled:

"An act to provide for the forfeiture and sale of boats, vehicles and other conveyances used in the unlawful transportation or possession of intoxicating liquor within the state of Oregon, and for the proceedings in respect thereto, and for disposal of the proceeds of sale of such forfeited property; making it

a felony to place intoxicating liquor in any boat, vehicle or conveyance with intent to cause the same to be forfeited or confiscated, or the owner or person in charge to be made subject to prosecution; and declaring an emergency."

Sections 11 and 12 of said act provide:

"Section 11. Whenever, in proceedings under this act, intoxicating liquor is shown to have been found in or upon any boat, vehicle or other conveyance or in the possession of any person in or upon the same, or is proved to have been transported or kept therein, it shall be presumed that the same was done with the knowledge and consent of the owner and of the person in charge of or possession of such boat, vehicle or other conveyance and with the knowledge and consent of any holder of any lien thereon, but such presumption shall be a disputable one. If any person proceeded against or intervening for the protection of his interest in such proceedings shall establish to the satisfaction of the court, by a preponderance of the evidence, that he is and was at the time of the commission of the act or acts for which said boat, vehicle or other conveyance is subject to forfeiture, the actual and bona fide owner thereof, and that the said boat, vehicle or other conveyance had been taken and was being used by the person or persons in possession thereof at the time of the commission of said unlawful act or acts without his knowledge and consent, and that he had no notice or knowledge of such possession or of such unlawful use of the same, said boat, vehicle or other conveyance shall be ordered by the court to be ordered by the court (*sic*) to be returned to such owner; and * * * if it be established to the satisfaction of the court, at the hearing, that any person has a bona fide lien on such boat, vehicle or other conveyance, that the said lien was created without the lienor having any notice or knowledge that such boat, vehicle or other conveyance was being used or was to be used for the illegal transportation of intoxicating liquor,

and that such ignorance thereof had continued up to the time of said seizure, then said lien shall be ordered to be paid and discharged, so far as the same shall suffice therefor, out of the proceeds of the sale of said property after payment of costs and expenses of the seizure, keeping and sale thereof, and of the proceedings and trial as herein provided for. All liens against property sold under the provisions of this act, established as herein provided, and adjudged to be paid therefrom, shall be transferred from the property to the proceeds of the sale.

"Section 12. When any property is sold under the provisions of this act the proceeds shall be applied as follows:

"1. To the payment of the costs of the forfeiture proceedings and actual expenses of seizing, keeping and preserving the property.

"2. To the payment of any liens adjudged to be paid. * * *"

Public policy will not permit the enforcement of a contract which offers a temptation to violate the law or which undertakes to indemnify another against the consequences of an act which is illegal.

In the case of *Gordon v. Gordon,* 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D, 576, 578, the court discussed public policy as follows:

"There are many acts which the law positively forbids, and for the doing of which some penalty is attached. Whether the prohibition is by the common law or by statute is immaterial. Any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal and void.

"There are also many things which the law does not prohibit, in the sense of attaching penalties, but

which are so mischievous in their nature and tendency that on grounds of public policy they can not be admitted as the subject of a valid contract.

"It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.

"But the notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. Public policy, therefore, is variable; and that which is contrary to the policy of the public at one time may become public policy at another time. No hard and fast rule can be given by which to determine what is public policy.

"It has been said that a contract is against public policy if it is injurious to the interests of the public, or contravenes some established interest of society, or if it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society, and is in conflict with the morals of the time. *Pueblo & A. Valley R. Co. v. Taylor,* 6 Colo. 1, 45 Am. Rep. 512; *McNamara v. Gargett,* 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218.

"The rule must not be understood to mean that in order that a contract may be declared to be against public policy, it must be inimical to morality. Many contracts which are not immoral are nevertheless void on the ground that they are against public policy. *Kohn v. Milcher,* (C. C.) 10 L. R. A. 439, 43 Fed. 641.

"In applying this rule, it has been said that contracts are against public policy when they tend to injustice or oppression, restraint of liberty and natural or legal right, or the obstruction of justice, or the violation of

a statute, or to interfere with or control executive, legislative, or other official action, or to prevent competition whenever a statute or any known rule of law requires it."

People v. Herrin, 284 Ill. 368, 120 N. E. 274, 276.
Greenhood on Public Policy, page 2.
Cooper v. N. P. Ry. Co., 212 Fed. 533, 534, 536.

Public policy demands that every possible precaution be taken to prevent the transportation and sale of intoxicating liquor, and every contract and every law should be strictly construed against all persons who would be enabled to violate the law with impunity and to receive protection against loss on account of such violation.

II

The act of February 13, 1925, 43 Stat., chap. 229, p. 938 (section 238, Judicial Code), authorizes a direct appeal to the United States supreme court from a final judgment or decree of a district court in any suit brought for the purpose of enjoining the enforcement of an order made by an administrative board or commission created by and acting under the statute of a state. Such appeal provision does not depend upon the number of judges sitting in accordance with the law in effect when the case was tried, but depends upon the relief sought by the suit.

First: That it appears from the complaint of plaintiffs herein that this suit was brought in the District Court of the United States for the District of Oregon for the purpose of enjoining and restraining the appellant herein, as head of the Department of Insurance of the State of Oregon, from enforcing that certain order of the Department of Insurance known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," set out in full in paragraph fifth, point I, hereof.

Second: That this suit involves a constitutional question in that plaintiffs allege in their complaint (paragraph Ninth, p. 8, Transcript of Record) as follows:

> "That the said action of the said defendant * * * will impair each and all of said conditional sale contracts, injuriously affect the standing and reliability of plaintiffs as surety companies, entirely destroy the general business of each and good will thereof, in said state, thereby causing inestimable and irreparable damage and injury to said plaintiffs and each of them and depriving plaintiffs of their property without due process of law, in contravention of section 1 of the fourteenth amendment to the Constitution of the United States."

Third: That a final decree was entered in said cause on or about May 18, 1925 (p. 22, Transcript of Record), decreeing that said confiscation coverage is lawful insurance within the state of Oregon, and enjoining and restraining the appellant herein from enforcing the provisions of the order of the Department of Insurance known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," withdrawing the approval of appellant's predecessor, the former Insurance Commissioner, of appellees' confiscation coverage, and further enjoining and restraining appellant from interfering in any manner with or obstructing the transacting of said business by appellees herein, or either or any of them, or by their agents within the state, or the underwriting of confiscation coverage within the state of Oregon.

Fourth: That on or about June 1, 1925, an appeal from the final decree of the District Court of the United States for the District of Oregon in said cause was taken to and is now on file in this court (p. 23, Transcript of Record). That such appeal is authorized by the act of

February 13, 1925, 43 Stat., c. 229, p. 938 (amending section 238 of the Judicial Code), providing for a direct review by the supreme court from a final decree granting a permanent injunction in a suit to restrain the enforcement of an order made by an administrative board or commission created by and acting under a statute of a state, which act reads, in part, as follows:

> "A direct review by the supreme court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following acts or parts of acts, and not otherwise:
>
> * * * * * * *
>
> "(3) An act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a state or of an order made by an administrative board or commission created by and acting under the statute of a state, approved March 4, 1913, which act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit.'"

The act of March 4, 1913, 37 Stat., p. 1013, c. 160 (the same being section 266 of the Judicial Code), as amended by the act of February 13, 1925, 43 Stat., p. 938, c. 229, now reads as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the supreme court, or by any district court of the United

States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the supreme court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the supreme court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; provided, however, that one of such three judges shall be a justice of the supreme court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the state, and to such other persons as may be defendants in the suit; provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the supreme court, or any circuit or distruct judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the supreme court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

* * * * * * *

"The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit."

It is the purpose of the act of March 4, 1913, 37 Stat., p. 1013, c. 160, as amended, to prescribe the manner of procedure in case an administrative order is attacked as unconstitutional, and to provide for a direct appeal to the United States Supreme Court in such suit.

In the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292, it was held that section 266, Judicial Code, in its application to cases involving orders of state administrative boards, was not confined by the amendment of March 4, 1913, to those cases in which the constitutionality of a statute is challenged, but applies also to where the order is attacked as in itself unconstitutional, the court said:

"A doubt has been suggested whether these cases are within section 266 of the Judicial Code, act of March 3, 1911, chapter 231, 36 Stat. 1087, 1162; as amended by the act of March 4, 1913, chapter 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitu-

tionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co. v. Finn*, 235 U. S. 601, 604; *Phoenix Ry. Co. v. Geary*, 239 U. S. 277, 280, 281; *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U. S. 212; *Western & Atlantic R. R. v. Railroad Commission of Georgia*, ante, 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 301, 318; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 555; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest."

Fifth: Although the plaintiffs asked in their complaint (subdivision 1, paragraph Tenth, page 8, Transcript of Record) for an interlocutory injunction, no particular motion was filed bringing this request to the court's attention, and the only decree entered herein was the final decree granting a permanent injunction in this suit, which did not require the presence of three judges under the law as it existed at the time of the final hearing in such case. This fact does not affect appellant's right of appeal herein, direct to this court, as provided by act of February 13, 1925, 43 Stat., chapter 229, page 938 (section 266, Judicial Code), which act became effective May 13, 1925, or five days before the said final decree was rendered on May 18, 1925, and by its very terms (section 14) makes it applicable to this case. Said section 14 reads as follows:

> "That this act shall take effect three months after its approval; but it shall not affect cases then pending in the supreme court, nor shall it affect the right to a

review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

The case of *Brooklyn Union Gas Co. v. Prendergast,* (Dist. Court, E. D. New York) 7 Fed. (2d) 628, 659, was an action involving orders of the Public Service Commission fixing standard of gas and fixing maximum rate. The court said:

> "The motion came on to be heard on the 15th day of April, 1925, and was, at the request of the attorney for the attorney-general of the state of New York, adjourned to May 5, 1925, when it was argued and all briefs finally submitted.
>
> "I agree with all the counsel in this case that the provisions of the act February 13, 1925 (43 Stat. 938), amending section 238 of the Judicial Code, which went into effect May 13, 1925, do not apply, inasmuch as the case was finally submitted before a court consisting of three judges could be called, and that, having been finally submitted before such statute went into effect, this court has power to determine this motion and enter a decree."

While this is not a decision of the supreme court, if it be taken as a correct statement of the law, as to the entry of the decree in a matter pending after final hearing at the time such law became effective, as in the instant case, nevertheless it could not apply to the right of appeal from such decree, because no decree had been entered and no right of appeal had accrued when the act took effect. The provision of the statute granting the right to appeal is purely a matter of remedy in connection with procedure, and as such applies to pending cases from the effective date of the act. This is clearly the provision of the act itself, contained in section 14 above quoted. There-

fore, from the fact that the decree was entered after the new law went into effect, the right of appeal accrued under and is granted and regulated by the amended statute.

It is well settled that the right of appeal or other review in an appellate court is governed by the provisions of the law applicable thereto in force at the time when the judgment is rendered.

Notley v. Brown, 212 U. S. 570.

In the recent case of *Del Pozo et al. v. Wilson Cypress Co.*, 46 Sup. Ct. R. (Advance Opinions No. 4), 57, 58, this court said:

> "The motion to dismiss must be denied. The appeal was taken under sections 128 and 241 of the Judicial Code (Comp. St. §§ 1120, 1218), as existing when the decree of affirmance by the circuit court of appeals was entered, and is not affected by the subsequent act of February 13, 1925, chapter 229, 43 Stat. 936. Section 128 provided that the decisions of the circuit courts of appeals in certain classes of cases should be final, in the sense of being not reviewable by this court on writ of error or appeal; and section 241 provided that the decisions of those courts in other cases should be subject to such a review where the matter in controvery, exclusive of costs, exceeded $1,000. This suit was not within any of the classes named in section 128, and the matter in controversy exceeded $1,000, apart from costs. Therefore the suit was one in which an appeal was admissible."

The right of appeal direct to the United States Supreme Court is given as to the suit itself without regard to interlocutory injunction. No suit can be commenced in good faith merely to obtain an interlocutory injunction.

Hence, the language of the statute under consideration wherein it relates to appeal of "such suits," can not refer to other than all suits brought to restrain the enforcement of state acts and orders as therein specified.

The question involved in this suit is not trivial or insignificant, but is one of very great importance to the State of Oregon as well as to the federal government. The enforcement of the federal, state and municipal laws prohibiting the transportation and sale of intoxicating liquors will be greatly hampered if this appeal is dismissed.

Wherefore, appellant, having shown cause why the appeal herein should not be dismissed for lack of jurisdiction, prays that the decree herein of the District Court for the District of Oregon may be reversed and held for naught.

Respectfully submitted,

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